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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants; SIERRA CLUB et al., Interveners and Appellants.	H039154 (Santa Clara County Super. Ct. No. CV163328)

The Sierra Club and the Carmel River Steelhead Association (CRSA) appeal from an order denying their motion for attorney's fees pursuant to Code of Civil Procedure section 1021.5.[1] We conclude that the order is not appealable and dismiss the appeal.[2]

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[1] All further statutory references are to the Code of Civil Procedure unless stated otherwise.

[2] Since the appeal is dismissed, we do not consider the issues raised by the Sierra Club and the CRSA.

I. Background

Water is diverted from the Carmel River in Monterey County by California-American Water Company (Cal-Am). On October 20, 2009, the State Water Resources Control Board (State Board) issued order WR 2009-0060 against Cal-Am, which found, among other things, that Cal-Am was violating Water Code section 1052 and had not complied with a cease and desist order (Order 95-10) to stop unauthorized diversion of water. Cal-Am was directed to immediately reduce its diversions from the Carmel River and to make additional reductions in subsequent years. Cal-Am was also ordered not to divert water from the Carmel River for new service connections. A week later, the Monterey Peninsula Water Management District (District) and Cal-Am filed separate petitions for writ of mandate and complaints for declaratory and injunctive relief against the State Board.

On October 30, 2009, the District brought an ex parte application to stay Order 95-10. Three days later, the trial court issued the stay. On November 13, 2009, the State Board, which was represented by the Attorney General, brought an ex parte application to dissolve the stay. Both the District and Cal-Am filed opposition to the application to dissolve the stay.

On December 10, 2009, the Sierra Club and the CRSA filed an answer to the District's petition for writ of mandate, complaint for declaratory and injunctive relief, and request for stay. The following day, the Sierra Club and the CRSA filed a motion to intervene and a memorandum in support of joinder in the State Board's application to dissolve the stay.

On January 5, 2010, the State Board issued order WR 2010-001 denying reconsideration and amending order WR 2009-0060 (collectively Order). Shortly thereafter, the District's case was transferred to Santa Clara County.

In March 2010, Cal-Am brought a motion for a preliminary injunction and stay of the Order. The motion was opposed by the State Board, the Sierra Club, and the CRSA.

On May 7, 2010, the trial court granted the State Board's motion to transfer Cal-Am's case and consolidate it with the District's case. The trial court also found that "a stay of an administrative order and the requested preliminary injunction against application of the administrative order are extraordinary interim relief. Given the extraordinary relief sought, the Court is unwilling to conclude [the District and Cal-Am] are likely to succeed on the merits of their claims and cannot find the [District and Cal-Am] will suffer irreparable harm while the case is pending before the Court if Order WR 2009-0600 is not stayed." Thus, the trial court dissolved the stay and denied the motion for preliminary injunction.

In April 2011, pursuant to the stipulation of Cal-Am, the District, and the State Board, among others, the trial court granted the Sierra Club's motion to intervene.

In July 2012, the District, Cal-Am, the State Board, the Sierra Club, and the CRSA, among others, entered into a stipulation for dismissal without prejudice and an agreement to toll the statute of limitations (Stipulation and Agreement to Toll). The Stipulation and Agreement to Toll summarized the procedural background of the case. It also stated that the parties had engaged in several days of settlement negotiations, including mediation. The parties then agreed that the District and Cal-Am would dismiss their cases without prejudice so that all parties would "collectively focus their attention on development of alternative water supplies for the Monterey region to the benefit of Cal-Am's customers and the South Central California Coast Steelhead Distinct Population Segment . . . ." The parties also specifically agreed that the statute of limitations would be tolled as defined in their agreement, and that this tolling period would not be included "in calculating any statutes of limitations that might be applicable, in any future civil action(s) for judicial review of the Order, as to any claims alleged in the [District] and Cal-Am Cases."

On August 1, 2012, the trial court approved the Stipulation and Agreement to Toll and entered it as an order.

On October 1, 2012, the Sierra Club and the CRSA brought a motion for attorney's fees in the amount of $256,934 pursuant to section 1021.5. Both the District and Cal-Am filed opposition to the motion.

On December 17, 2012, the trial court denied the motion for attorney's fees without prejudice. The trial court found that "the Stipulation and Agreement to Toll preserves the right, if necessary, for the parties to challenge the merits of the Cease and Desist Order and accordingly, [the Sierra Club and the CRSA] are not deemed a prevailing or successful party for purposes of imposing fees pursuant to C.C.P. § 1021.5."

II. Discussion

Both the District and Cal-Am contend that the order denying the motion for attorney's fees is not appealable. We agree.

"The existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292.) "[I]f the order or judgment is not appealable, the appeal must be dismissed. [Citation.]" (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 302.)

Section 904.1, subdivision (a) provides in relevant part: "An appeal, other than in a limited civil case, may be taken from any of the following: [¶] (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt . . . . [¶] (2) From an order made after a judgment made appealable by paragraph (1)."[3]

[3] Paragraphs 8, 9, and 11 of section 904.1, subdivision (a) are inapplicable to the present case. They provide: "(8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an (*continued*)

A judgment is not interlocutory "'"'"'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"' [Citations.] '"It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that *where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final,* but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." ' [Citations.]" (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.)

We first note that the trial court's order which approved the Stipulation and Agreement to Toll was not a final judgment, because it did not terminate the litigation between the parties. The District and Cal-Am dismissed their petitions without prejudice and the parties agreed to a tolling period which would allow a "future civil action for judicial review." Since the order does not qualify as a final judgment, the order denying an award of attorney's fees without prejudice is not a postjudgment order which is appealable under section 904.1, subdivision (a)(2).

The Sierra Club and the CRSA contend, however, that the order denying the motion for attorney's fees is appealable under the collateral order doctrine. Under that doctrine, an interlocutory order is appealable if: (1) the order is collateral to the subject matter of the litigation; (2) the order is final on the collateral matter; and (3) the order directs payment of money by the appellant or performance of an act by or against the

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accounting. [¶] (9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made. [¶] . . . [¶] (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)."

appellant. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 76 (*Mercury*).) There is "a division of opinion and split of authority on the necessity of complying with the third element" of the test. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 298.; see *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 900-901.) The majority view requires all three elements. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 2:77-2:80, pp. 2-45 to 2-48.) This court has followed the majority view. (*Mercury*, at pp. 76-77.) Here, the order does not direct the payment of money by the Sierra Club or the CRSA. It also does not direct them to perform an act. Moreover, the trial court denied the motion without prejudice. Accordingly, the collateral order doctrine is inapplicable to the present case.

Relying on *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705 (*Lopez*) and *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810 (*Stonewall*), the Sierra Club and the CRSA request that this court treat the appeal as a petition for writ of mandate. We decline to do so.

In *Lopez*, the plaintiff appealed from a minute order granting summary judgment in favor of Friedman Brothers Investment Company (Friedman). (*Lopez, supra*, 45 Cal.App.4th at p. 710.) Since Friedman's cross-complaint was pending against another defendant, a final appealable judgment could not be entered against Friedman. (*Id.* at p. 710, fn. 1.) *Lopez* reasoned: "Inasmuch as the action appears to be proceeding as to a codefendant, it would best serve the interests of justice that the matter of the summary judgment in favor of Friedman be reviewed now to obviate possible multiple trials in this case." (*Ibid.*) Thus, the Court of Appeal exercised its discretion to treat the notice of appeal as a petition for writ of mandate. (*Ibid.*) In contrast to *Lopez*, here, the review of the motion denying an award of attorney's fees would not serve the interest of judicial economy.

In *Stonewall*, the appellants purported to appeal from a judgment entered after the first phase of a two-phase trial. (*Stonewall*, *supra*, 46 Cal.App.4th at p. 1829.) However, the Court of Appeal decided to treat the notices of appeal as petitions for peremptory writ of mandate. (*Id.* at p. 1831.) *Stonewall* reasoned that the briefs and record included all that was required for an original mandate proceeding and that "' . . . the case in its present posture presents unusual circumstances making it appropriate to ascertain from the record whether there are substantive errors that [we] should, by writ, order the trial court to correct' . . . ." (*Ibid.*) These circumstances included: (1) all parties argued that the appeal of the first phase judgment should proceed; (2) the merits of the issues had been briefed once in the Supreme Court and twice in the appellate court; and (3) "[t]o proceed through the trial of Phase II and at some point of time thereafter ascertain through the appellate process that the trial court committed reversible error in Phase I so that both Phase I and potentially Phase II need to be retried would be too kafkaesque a result." (*Id.* at pp. 1831-1832.) Unlike in *Stonewall*, here, not all parties agree that the appeal should proceed. More importantly, judicial economy would not be served by treating the present notice of appeal as a petition for writ of mandate, since the District and Cal-Am could elect to challenge the State Board's order in a future civil action and the outcome of any such challenge could preclude an award of attorney's fees to the Sierra Club and the CRSA.

In sum, the order denying the motion for attorney's fees is not appealable.[4]

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[4] The Sierra Club and the CRSA have filed a request for judicial notice of documents that are part of the official record of the California Public Utilities Commission (CPUC). These documents include: (1) the Settling Parties' Motion to Approve Settlement Agreement, which was filed on July 31, 2013, and includes a copy of the settlement agreement; (2) a CPUC docket sheet showing that the motion was filed before the CPUC; and (3) a decision of the CPUC issued March 28, 2011, which is entitled "Decision Directing Tariff Modifications to Recognize Moratorium Mandated by State Water Resources Control Board." The Sierra Club and the CRSA have also filed a supplemental request for judicial notice of documents consisting of: (1) an official (*continued*)

III. Disposition

The appeal is dismissed. The parties shall bear their own costs on appeal.

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announcement dated March 25, 2011, from the District announcing that on March 24, 2011, a CPUC decision approved Cal-Am's moratorium request; and (2) a memorandum from the District's counsel to the District's general manager concerning the moratorium on new or expanded water service connections, which is dated February 11, 2014. They seek judicial notice to refute Cal-Am's claim that the moratorium, as ordered by the State Board, is being implemented. However, even assuming that these documents were before the trial court and are judicially noticeable, none of these documents are relevant to the issue of whether the Sierra Club and the CRSA have filed from an appealable order. Accordingly, the requests for judicial notice by the Sierra Club and the CRSA are denied.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Grover, J.